84-586
No.

Office Supreme Court, U.S.
FILED
OCT 10 1984
ALEXANDER L. STEVAS,
CLERK

In The

Supreme Court of the United States

OCTOBER TERM, 1984

PETER ANGEL,

Petitioner,

-vs-

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Counsel of Record
SAMUEL ASBELL
900 Haddon Avenue
Collingswood, New Jersey 08108
(609) 858-7011

Of Counsel
JOSEPH A. CARMEN
43 Kings Highway West
Haddonfield, New Jersey 08033
(609) 429-0201

Attorneys for Petitioner

THE SUPERIOR APPELLATE PRINTING COMPANY
P.O. Box 363
Cranbury, N.J. 08512
Area Code 609
443-4202

11/12

QUESTION PRESENTED

Whether prosecutions brought under the Resource Conservation and Recovery Act (RCRA), more specifically 42 U.S.C. Sec. 6928(d)(2)(A)(1982) which imposes strict standards on those persons responsible by statute to obtain permits from the Evironmental Protection Agency should be interpreted to include employees as well as owners and operators of such facilities under the theory that employees knew or should have known that compliance was necessary under the permit provision of 42 U.S.C. Sec. 6928(d)(2)(A)(1982).

PARTIES

Parties to the proceeding in the United States Court of Appeals for the Third Circuit whose judgment is sought to be reviewed were the United States of America, Jack W. Hopkins and Peter

Angel. A third defendant, Johnson and Towers, Inc., entered a plea of guilty in the United States District Court for the District of New Jersey.

TABLE OF CONTENTS

	Page
Opinions Below.....	1
Jurisdiction.....	3
Statutes Involved.....	3
Statement of Case.....	4
Reasons for Granting Writ.....	13
Appendix A (Opinion of United States Court of Appeals for the Third Circuit of August 15, 1984)....	1a
Appendix B (Order Amending Opinion of United States Court of Appeals for the Third Circuit of August 21, 1984).....	34a
Appendix C (Opinion of United States District Court for the District of New Jersey of September 6, 1983).....	36a
Appendix D (Order of United States District Court for the District of New Jersey of September 6, 1983).....	69a
Appendix E (Indictment of United States Grand Jury sitting at Camden, New Jersey, against Petitioner filed March 29, 1983).....	71a

TABLE OF AUTHORITIES

Cases	Page
Busic v. United States, 100 S. Ct. 1747 (1979)	13
Donnelly v. United States, 276 U.S. 505 (1972)	13
United States v. Dotterweich, 421 U.S. 658 (1975)	14
Statutes	
18 U.S.C. Sec. 2	6
18 U.S.C. Secs. 371 and 2	8
28 U.S.C. Sec. 1254(1)	3
33 U.S.C. Sec. 1319	5,8
42 U.S.C. Sec. 6925(a)	4,11
42 U.S.C. Sec. 6928(d)(2)(a)	3,5,11 13,14
Regulations	
40 C.F.R. Sec. 260.10	4,9,11

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1984
No.

PETER ANGEL, Petitioner

v

THE UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Peter Angel, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above entitled case on August 15, 1984 and amended on August 21, 1984.

OPINIONS BELOW

The August 15, 1984 opinion of the United States Court of Appeals for the Third Circuit, whose judgment is herein sought to be reviewed is No. 83-5745,

unreported, and is reprinted in Appendix A, pp 1a-33a. Said opinion was amended on August 21, 1984 and is reprinted in the Appendix, B pp 34a-35a. The opinion of the United States District Court for the District of New Jersey was rendered September 6, 1983, unreported and is reprinted in the Appendix C pp 36a-68a.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on August 15, 1984, and amended on August 21, 1984. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves a criminal prosecution brought under the following sections of the Resource Conservation and Recovery Act which provides at 42 U.S.C. Sec. 6928 (d)(2)(a):

> (d) Criminal penalty - Any person who knowingly--
>
> ....
>
> (2) Knowingly treats, stores, or disposes of any hazardous waste identified or listed under this subchapter either--
>
> (A) without having obtained a permit under section 6925 of this title...
>
> shall, upon conviction, be subject to a fine of not more than

> $25,000 ($50,000 in the case of violation of paragraph (1) or (2)) for each day of violation, or to imprisonment not to exceed one year (two years in the case of a violation of paragraph (1) or (2)) or both...

Further, 42 U.S.C. 6925(a) states and requires:

> (a) each person owning or operating a facility for the treatment, storage, or disposal of hazardous waste identified or listed under this subchapter to have a permit issued pursuant to this section.

This case also involves the definition of "operator" as set forth in 40 C.F.R. Sec. 260.10 (1982).

> Operator means the person responsible for the overall operation of the facility.

STATEMENT OF THE CASE

This is a criminal action whereby an indictment was returned by the Grand Jury for the District of New Jersey filed March 29, 1983 bearing Criminal

No. 83-83 [p71a][1/] charging Johnson and Towers, Inc., Peter Angel and Jack W. Hopkins with conspiracy involving the unlawful treatment, storage and disposal of hazardous waste in violation of 18 U.S.C. Sec. 371, three counts of unlawful disposing of hazardous waste without a permit in violation of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. Sec. 6928(d)(2)(A)(1982), and one count of unlawful discharge of pollutants from a point source in violation of the criminal provisions of the Federal Water Pollution Control Act, 33 U.S.C. Sec. 1319. With respect to the three RCRA counts, the Indictment also charges the defendants aided and abetted

---

1/ Designations "a" refer to pages in Petitioner's appendix.

the unlawful dumping in violation of 18 U.S.C. Sec. 2.

The defendants all entered pleas of not guilty on April 8, 1983, however, several weeks later, the corporate defendant, Johnson and Towers, Inc., entered a plea of guility to the three RCRA counts and received concurrent fines of $20,000 on each count.

On June 13, 1983, the defendant, Peter Angel, filed a Motion for Dismissal of counts 2, 3 and 4 of the indictment which was joined in by defendant, Jack W. Hopkins. After briefing and oral argument United States District Court Judge on September 7, 1983 granted the defendants' motions to dismiss the substantive counts of the RCRA charges, however, denied the motions to the extent that the defendants could criminally be held responsible for aiding and abetting the

violation of RCRA [p69a].

The United States moved for reconsideration and after additional briefing and oral argument, the court denied the application on October 14, 1983 summarily. The government then filed a timely appeal with the United States Court of Appeals for the Third Circuit, and after briefing, oral argument was ordered and subsequently held on May 21, 1984. On August 15, 1984 the Circuit Court reversed the District Court's ruling and reinstated the three substantive RCRA counts of the indictment [p 1a]. The case was remanded to the District Court for trial, said trial to be consistent with the opinion of the Circuit Court.

The basis for jurisdiction was the return by the Federal Grand Jury sitting at Camden of an indictment

predicated upon 18 U.S.C. Secs. 371 and 2, 42 U.S.C. Sec. 6928(d)(2)(A), and 33 U.S.C. Sec. 1319.

Factually, Johnson and Towers, Inc. is a company which builds, repairs, overhauls and designs large motors of all types. Its plant is located in Mt. Laurel, New Jersey, and it employs the defendants, Peter Angel and Jack W. Hopkins. The total ownership and operation of the Johnson and Towers corporation is held by two brothers; Walter Johnson is President and Chairman of the Board of Directors and Peter Johnson who is Executive Vice President of the corporation and General Manager of the plant. Neither of the Johnson brothers was charged or indicted in this case even though they clearly fit within the definition of owner and operator

as set forth in the definitions of same in 40 C.F.R. Sec. 260.10(1982).

The Mt. Laurel plant is equipped with floor drains in which water and degreasers flow from the cleaning process utilized for purposes of cleaning and stripping engines. As water and grease is cleaned from the various motors, the liquid flows into the flow drains and funnels through piping into a separator holding tank on the plant grounds. The function of the separator tank is to allow the water to separate from the other substances. The water flows into a leech field, while the oil, grease and other substances are held in the separator tank for disposal by licensed waste haulers. Evidently, due to the unusually high water table in the area, the water flow-off from the separator tank would back up into the tank causing the water in the tank to

overflow during periods of heavy rainfall.

It is alleged that on June 8, 9 and 10 of 1981, defendants Angel and Hopkins directed a water pump to be used in an effort to pump the water from the separator tank before it overflowed as a result of the water table. The government alleges that the water included hazardous chemicals and since the leech field flows into a nearby creek, which in turn flows into the Delaware River, a violation had taken place whereby the defendants Angel and Hopkins did not possess the necessary permit to dump under RCRA. Obviously, by the corporate defendant's plea of guilty, it conceded that it was a disposer of hazardous waste and it did not apply for nor possess the necessary permit under RCRA.

The very narrow issue to which must be addressed is the construction of 42

U.S.C. Sec. 6928(d)(2)(A) which reads, in pertinent part, as follows:

> Any person who--
>
> (2) Knowingly treats, stores or disposes of any hazardous waste identified or listed under this subchapter....
>
> (A) without having obtained a permit under section 6925 of this title...

The permit section of 42 U.S.C. Sec. 6925 (a) requires applications and possession of permits by "each person owning or operating a facility.....for disposal of hazardous waste.....to have a permit." 42 U.S.C. Sec. 6925(a). The regulations further defines operator as "the person responsible for the overall operation of the facility" 40 C.F.R. Sec. 260.10(1982) (our emphasis). It is conceded that defendant Angel is an employee and the District Court held that as an employee he did not qualify to obtain a permit under the RCRA [p60a]. The Circuit

Court while seemingly confused as to the title of defendant Angel [p32a] still held that "section 6928(d)(2)(A) covers employees as well as owners and oprators" [p 7a] (our emphasis) and further adds to the statute that employees can be subject to criminal prosecution only if "they knew or should have known" that there was no compliance with 42 U.S.C. Sec. 6928(d)(2)(A).

The Circuit Court of Appeals did not address the issue of construction of criminal statutes as set forth in a long line of cases from Donnelly v. United States, 276 U.S. 505 (1927) to Busic v. United States, 100 S. Ct. 1747 (1979) whereby such statutes should be narrowly construed. Instead, the Circuit Court liberally construed the statute and in fact added another class of offender to the statute, i.e., "employees" [p 7a]

wherein the classification of same is totally absent from the statutory language.

Finally, an examination of the opinions of both court's opinions reveals totally different views of the legislative history and Congressional intent of RCRA andalso in the application of United States v. Dotterweich,421 U.S. 658(1975) insofar as the Circuit Court of Appeals used the above to expand the meaning of the RCRA, while, on the other hand, the District Court used all of the above to strictly construe the Act.

REASONS FOR GRANTING WRIT

This is a case of first impression. It is only the third criminal prosecution brought under RCRA nationwide. It is the first such prosecution in the State of New Jersey, and it is the first to

interpret 42 U.S.C. Sec. 6928(d)(2) of RCRA. It is an important question of federal law and has nationwide ramifications as it applies to the literally hundreds of disposers of hazardous waste. The decision of the Circuit Court of Appeals expands the Act to encompass all employees no matter how far down the scale of responsibility and control said employee might be.

It further burdens these employees with the criminal culpability of their corporate supervisors who initially and totally bear the responsibility for obtaining the necessary permits from EPA. The Circuit Court recognized the affect of their ruling when it remarked:

> "though the result may appear harsh [p13a]

In a sense, it is not a question of harshness, but a question of inter-

pretation. On the one hand we have a strictly construed interpretation by the District Court and on the other hand we have an all encompasing interpretation from the Circuit Court.

Moreover, we think that the Court of Appeals misconstrued the statute and in fact legislated into the statute the word employee, applying in essence an almost civil view of a criminal statute. In any event the dichotomy of opinion of the two courts and the need for clarification should compel this Court to grant certification.

For the Petitioner,
Peter Angel

/s/ Samuel Ashell, Esq.
OF RECORD

/s/ Joseph A. Carmen, Esq.
OF COUNSEL

Appendix

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-5745

UNITED STATES OF AMERICA,

Appellant

v.

JOHNSON & TOWERS, INC.,
JACK W. HOPKINS and PETER ANGEL

On Appeal from the United States
District Court for the
District of New Jersey
(D.C. Criminal No. 83-00083)

Argued May 21, 1984

BEFORE: GARTH, SLOVITER, Circuit Judges,
and NEAHER, District Judge*

(Opinion filed August 15, 1984)

Michael Gilberti (Argued)
Assistant U.S. Attorney
W. Hunt Dumont
U.S. Attorney
970 Broad Street
Newark, NJ 07102

Attorneys for Appellant

---

* Hon. Edward R. Neaher, United States District Court for the Eastern District of New York, sitting by designation.

Joseph A. Carmen (Argued)
43 Kings Highway West
Haddonfield, NJ 08033

Attorney for Appellee Peter Angel

Jeffrey A. Libert (Argued)
Falciani & Fletcher
35 South Broad Street
Woodbury, NJ 08096

Attorney for Appellee Jack W. Hopkins

OPINION OF THE COURT

SLOVITER, Circuit Judge.

Before us is the government's appeal from the dismissal of three counts of an indictment charging unlawful disposal of hazardous wastes under the Resource Conservation and Recovery Act. In a question of first impression regarding the statutory definition of "person," the district court concluded that the Act's criminal penalty provision imposing fines and imprisonment could not apply to the

individual defendants. We will reverse.

I.

The criminal prosecution in this case arose from the disposal of chemicals at a plant owned by Johnson & Towers in Mount Laurel, New Jersey. In its operations the company, which repairs and overhauls large motor vehicles, uses degreasers and other industrial chemicals that contain chemicals such as methylene chloride and trichloroethylene, classified as "hazardous wastes" under the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. Secs. 6901-6987 (1982) and "pollutants" under the Clean Water Act, 33 U.S.C. Secs. 1251-1376 (1982). App. at 18a. During the period relevant here, the waste chemicals from cleaning operations were drained into a holding tank and, when the tank was full, pumped into a trench. The trench flowed from the plant property into Parker's Creek, a tributary of the

Delaware River. Under RCRA, generators of such wastes must obtain a permit for disposal from the Evironmental Protection Agency (E.P.A.). The E.P.A. had neither issued nor received an application for a permit for Johnson & Towers' operattions.

The indictment named as defendants Johnson & Towers and two of its employees, Jack Hopkins, a foreman, and Peter Angel, the service manager in the trucking department.[1] According to the indictment, over a three-day period federal agents saw workers pump waste from the tank into the trench, and on the third day observed toxic chemicals flowing into the creek.

---

1. Angel was so described by the district court. App. at 18a. Angel's brief says he was "service manager of the parts department," Brief for Appellee Angel at 5, defendant Hopkins' brief calls Angel "the service manager," Brief for Appellee Hopkins at 5, and the government brief refers to him as "the plant supervisor," Brief for Appellant at 5. The record contains no information on the defendants' job titles or responsibilities.

Count 1 of the indictment charged all three defendants with conspiracy under 18 U.S.C. Sec. 371 (1982). Counts 2, 3, and 4 alleged violations under the RCRA criminal provision, 42 U.S.C. Sec. 6928(d) (1982). Count 5 alleged a violation of the criminal provision of the Clean Water Act, 33 U.S.C. Sec. 1319(c)(1982). Each substantive count also charged the individual defendants as aiders and abettors under 18 U.S.C. Sec. 2 (1982).

The counts under RCRA charged that the defendants "did knowingly treat, store, and dispose of, and did cause to be treated, stored and disposed of hazardous wastes without having obtained a permit ...in that the defendants discharged, deposited, injected, dumped, spilled, leaked and placed degreasers...into the trench...." The indictment alleged that

both Angel and Hopkins "managed, supervised and directed a substantial portion of Johnson & Towers' operations...including those related to the treatment, storage and disposal of the hazardous wastes and pollutants" and that the chemicals were discharged by "the defendants and others at their direction." The indictment did not otherwise detail Hopkins' and Angel's activities or responsibilities.

Johnson & Towers pled guilty to the RCRA counts. Hopkins and Angel pled not guilty, and then moved to dismiss counts 2, 3, and 4. The court concluded that the RCRA criminal provision applies only to "owners and operators," i.e., those obligated under the statute to obtain a permit. Since neither Hopkins nor Angel

was an "owner" or "operator,"[2] the district court granted the motion as to the RCRA charges but held that the individuals could be liable on these three counts under 18 U.S.C. Sec. 2 for aiding and abetting. The court denied the government's motion for reconsideration, and the government appealed to this court under 18 U.S.C. Sec. 3731 (1982).

We hold that section 6928(d)(2)(A) covers employees as well as owners and operators of the facility who knowingly

---

2. The government had argued before the district court that the individual defendants were "operators," a term defined in the regulations as "the person responsible for the overall operation of a facility." 40 C.F.R. Sec. 260.10 (1982). The district court found, however, that "[t]he use of the terminology 'overall operation' is indicative of an attempt to focus on those individuals who exercise primary control even though they may not actually own the company." and concluded that the defendants were not within this category. App. at 27. The government does not contest the finding on appeal.

treat, store, or dispose of any hazardous waste, but that the employees can be subject to criminal prosecution only if they knew or should have known that there had been no compliance with the permit requirement of section 6925.

II.

The single issue in this appeal is whether the individual defendants are subject to prosecution under RCRA's criminal provision, which applies to:

> [a]ny person who--
>
> ....
>
> (2) knowingly treats, stores, or disposes of any hazardous waste identified or listed under this subchapter either--
>
> (A) without having obtained a permit under section 6925 of this title ...or
>
> (B) in knowing violation of any material condition or requirement of such permit.

42 U.S.C. Sec. 6928(d) (emphasis added). The permit provision in section 6925, referred to in section 6928(d), requires "each person owning or operating a facility for the treatment, storage, or disposal of hazardous waste identified or listed under this subchapter to have a permit" from the E.P.A.

The parties offer contrary interpretations of section 6928(d)(2)(A). Defendants consider it an administrative enforcement mechanism, applying only to those who come within section 6925 and fail to comply; the government reads it as penalizing anyone who handles hazardous waste without a permit or in violation of a permit. Neither party has cited another case, nor have we found one, considering the application of this criminal provision to an individual other than an owner or operator.

A.

As in any statutory analysis, we are obliged first to look to the language and then, if needed, attempt to divine Congress' specific intent with respect to the issue. See Citizens Counsel v. Brinegar, No. 83-1669, slip op. at 11-12 (3d Cir. August 1, 1984). The language of the particular section under consideration does not readily support either interpretation proffered by the opposing parties. Had Congress merely intended an administrative enforcement measure, as defendants contend, it could have specified that any person required under section 6925 to obtain a permit would be liable for acting without one. On the other hand, if Congress had meant to subject to prosecution anyone who did not have a permit, as the government argues, it could have phrased subsection (A) of section 6928(d)(2) to provide

that any treatment, storage or disposal in the absence of a permit or outside the terms of such a permit is illegal. It did not so state explicitly.

However, if we view the statutory language in its totality, the congressional plan becomes more apparent. First, "person" is defined in the statute as "an individual, trust, firm, joint stock company, corporation (including a government corporation), partnership, association, State, municipality, commission, political subdivision of a State, or any interstate body." 42 U.S.C. Sec. 6903(15)(1982). Had Congress meant in section 6928(d)(2)(A) to take aim more narrowly, it could have used more narrow language. Cf. Russello v. United States, 104 S. Ct. 289, 300(1983) (RICO). Since it did not, we attribute to "any person" the definition given the

in section 6903(15).[3]

Second, under the plain language of the statute the only explicit basis for exoneration is the existence of a permit covering the action. Nothing in the language of the statute suggests that

---

3. The defendants argue that "person" should be interpreted narrowly because in two similar statutes, the Clean Air Act and the Clean Water Act, Congress added to its definition of "person" the category of "any responsible corporate officer," thus raising some doubt as to whether "person" was to be given its common-sense meaning. See 42 U.S.C. Sec. 7413(c)(3)(1982) (Clean Air Act); 33 U.S.C. Sec. 1319(c)(3)(1982) (Clean Water Act). Without passing on the meaning of "any person" in the Clean Air or Clean Water Act, which are not the subject of this appeal, we note that the addition in those acts of "any responsible corporate officer" seems to expand rather than limit the class of potential defendants. As the Supreme Court said in United States v. Dotterweich, 320 U.S. 277, 282 (1943), an exercise of draftsmanship intended to broaden the scope of a criminal provision "can hardly be found ground for relieving from such liability the individual agents of the corporation."

we should infer another provision exonerating persons who knowingly treat, store or dispose of hazardous waste but are not owners or operators.

Finally, though the result may appear harsh, it is well established that criminal penalties attached to regulatory statutes intended to protect public health, in contrast to statutes based on common law crimes, are to be construed to effectuate the regulatory purpose. See United States v. Park, 421 U.S. 658, 672-73 (1975); Smith v. California, 361 U.S. 147, 152 (1959); United States v. Dotterweich, 320 U.S. 277, 280-81, 284-85 (1943); United States v. Balint 258 U.S. 250, 251-52 (1922); see also United States v. Frezzo Brothers, Inc. 602 F.2d 1123, 1128 (3d Cir. 1979), cert. denied, 444 U.S. 1074 (1980).

The statutory construction issue

here, whether the criminal provision may be applied to the individual defendants who were not in the position to secure a permit, is similar to that presented to the Supreme Court in United States v. Dotterweich. There the defendant, a jobber, had been convicted of violating the Food and Drugs Act, providing a criminal penalty for "any person" shipping adulterated or misbranded drugs. Under the statute, there was no violation if a guaranty had been issued with the goods stating that they were not contaminated or misbranded. The drugs in question originated with the manufacturer and the jobber had undertaken only to label and ship them. The Court of Appeals overturned the conviction, concluding that the guaranty provision could apply only to principals and that the penalty provision must be correspondingly limited. The

court found it "difficult to believe that Congress expected anyone except the principal to get such a guaranty, or to make the guilt of an agent depend upon whether his employer had gotten one." United States v. Buffalo Pharmacal Co., 131 F.2d 500, 503(2d Cir. 1942).

The Supreme Court reinstated the conviction. In construing the term "any person," it rejected the Second Circuit's restrictive view, and said:

> The Food and Drugs Act of 1906 was an exertion by Congress of its power to keep impure and adulterated food and drugs out of the channels of commerce. By the Act of 1938, Congress extended the range of its control over illicit and noxious articles and stiffened the penalties for disobedience. The purposes of this legislation thus touch phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection. Regard for these purposes should infuse construction of the legislation if it is to be treated as a working instrument of government and not merey(sic) as a collection of English words.

Dotterweich, 320 U.S. at 280.

Thus, we must inquire into the congressional intent to determine whether RCRA should be construed in the same manner as was the Food and Drugs Act in Dotterweich.

B.

Congress enacted RCRA in 1976 as a "cradle-to-grave" regulatory scheme for toxic materials, providing "nationwide protection against the dangers of improper hazardous waste disposal." H.R. Rep. No. 1491, 94th Cong., 2d Sess. 11, reprinted in 1976 U.S. Code Cong. & Ad. News 6238, 6249, RCRA was enacted to provide "a multifaceted approach towards solving the problems associated with the 3-4 billion tons of discarded materials generated each year, and the problems resulting from the anticipated 8% annual increase in the volume of such waste." Id. at 2, 1976 U.S. Code Cong. & Ad.

News at 6239. The committee reports accompanying legislative consideration of RCRA contain numerous statements evincing the Congressional view that improper disposal of toxic materials was a serious national problem. See S. Rep. No. 172, 96th Cong., 2d Sess. 1, reprinted in 1980 U.S. Code Cong. & Ad. News 5019; H.R. Rep. No. 1491, supra at 3-4, 1976 U.S. Code Cong. & Ad. News at 6241.

The original statute made knowing disposal (but not treatment or storage) of such waste without a permit a misdemeanor. Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, Sec. 3008(d), 90 Stat. 2795, 2812 (1976). Amendments in 1978 and 1980 expanded the criminal provision to cover treatment and storage and made violation of section 6928 a felony. The fact that Congress

amended the statute twice to broaden the scope of its substantive provisions and enhance the penalty is a strong indication of Congress' increasing concern about the seriousness of the prohibited conduct.

Although Congress' concern may have been directed primarily at owners and operators of generating facilities, since it imposed upon them in section 6925 the obligation to secure the necessary permit, Congress did not explicitly limit criminal liability for impermissible treatment, storage, or disposal to owners and operators. The House Committee's discussion of enforcement contains several references relevant only to owners and operators, but it says, in addition: "This section also provides for criminal penalties for the person who... disposes of any hazardous waste without a permit under this title...." H.R. Rep. No. 1491, supra at 31, 1976 U.S. Code Cong. &

Ad. News at 6269 (emphasis added). The "also" demonstrates that the reach of section 6928(d)(2) is broader than that of the rest of the statute, particularly the administrative enforcement remedies. The acts that were made the subject of the criminal provision were distinguished in the House Report from the other conduct subject to administrative regulation because they were viewed as more serious offenses. As the Report explained, "[the] justification for the penalties section is to permit a broad variety of mechanisms so as to stop the illegal disposal of hazardous wastes." Id.

We conclude that in RCRA, no less than in the Food and Drugs Act, Congress endeavored to control hazards that, "in the circumstances of modern industrialism, are largely beyond self-protection." United States v. Dotterweich, 320 U.S. at 280.

It would undercut the purposes of the legislation to limit the class of potential defendants to owners and operators when others also bear responsibility for handling regulated materials. The phrase "without having obtained a permit under section 6925" (emphasis added) merely references the section under which the permit is required and exempts from prosecution under section 6928(d)(2)(A) anyone who has obtained a permit; we conclude that it has no other limiting effect. Therefore we reject the district court's construction limiting the substantive criminal provision by confining "any person" in section 6928(d)(2)(A) to owners and operators of facilities that store, treat or dispose of hazardous waste, as an unduly narrow view of both the statutory language and the congressional intent.

III.

A.

Since we must remand this case to the district court because the individual defendants are indeed covered by section 6928(d)(s)(A), it is incumbent on us to reach the question of the requisite proof as to individual defendants under that section. The government argues that "knowingly" applies only to "treats, stores, or disposes" of any hazardous waste, and that it does not have to show that the defendant knew either that the waste was hazardous or that there was no permit. Letter brief for Appellant at 2. Thus, the government argues, it need prove only that (1) the defendant is a "person", (2) the defendant handled hazardous material, and (3) there was no permit

for such disposal or treatment. We conclude that this interpretation is overly literal.

We focus again on the statory language:

> (a)ny person who--
>
> ....
>
> (2) knowingly treats, stores, or disposes of any hazardous waste identified or listed under this subchapter either--
>
> > (A) without having obtained a permit under section 6925 of this title...or
> > (B) in knowing violation of any material condition or requirement of such permit.

42 U.S.C. § 6928(d) (1982) (emphasis added).

If the word "knowingly" in section 6928(d)(2) referred exclusively to the acts of treating, storing or disposing, as the government contends, it would be an almost meaningless addition since it is not likely that one would treat,

store or dispose of waste without knowledge of that action. At a minimum, the word "knowingly", which introduces subsection (A), must also encompass knowledge that the waste material is hazardous. Certainly, "(a) person thinking in good faith that he was (disposing of) distilled water when in fact he was (disposing of) some dangerous acid would not be covered." United States v. International Minerals & Chemical Corp., 402 U.S. 558, 563-64 (1971).

Whether "knowingly" also modifies subsection (A) presents a somewhat different question. The district court concluded that it is not necessary to show that individual defendants prosecuted under section 6928(d)(2)(A) knew that they were acting without a permit or in violation of the law. Since we have

already concluded that this is a regulatory statute which can be classified as a "public welfare statute," there would be a reasonable basis for reading the statute without any mens rea requirement, as the Court did in United States v. Behrman, 258 U.S. 280, 288 (1922) and United States v. Balint, 258 U.S. 250, 252-54 (1922). See generally Morissette v. United States, 342 U.S. 246, 250-260 (1952) (distinguishing between regulatory statutes and those incorporating common law offenses). However, whatever policy justification might warrant applying such a construction as a matter of general principle, such a reading would be arbitrary and nonsensical when applied to this statute.

Treatment, storage or disposal of hazardous waste in violation of any material condition or requirement of a permit

must be "knowing," since the statute explicitly so states in subsection (B). It is unlikely that Congress could have intended to subject to criminal prosecution those persons who acted when no permit had been obtained irrespective of their knowledge (under subsection (A)), but not those persons who acted in violation of the terms of a permit unless that action was knowing (subsection (B)). Thus we are led to conclude either that the omission of the word "knowing" in (A) was inadvertent or that "knowingly" which introduces subsection (2) applies to sub-

section (A).[4]

As a matter of syntax we find it no more awkward to read "knowingly" as applying to the entire sentence than to read it as modifying only "treats, stores or disposes." The Eighth Circuit recently addressed a similar linguistic problem in a statute penalizing any person who "knowingly uses, transfers, acquires...or possesses [food] coupons...in any manner not authorized by this chapter...." 7 U.S.C. Sec. 2024(b). That court observed:

---

4. A similar statute construed by the Eighth Circuit also presented the disparity presented by RCRA in that Congress did insert the word "knowing" in one subsection but not in another. The court there concluded that "[t]he different placement of the words 'knowingly' and 'knowing' in the two subsections of the statute is too weak a reed to support the argument that Congress intended to displace a time-honored principle of criminal jurisprudence." United States v. Marvin, 687 F.2d 1221, 1226 (8th Cir. 1982), cert. denied, 103 S. Ct. 1768 (1983).

> [P]urely as a verbal matter, the word "knowingly" in subsection (b) may naturally be read to modify the entire remainder of the clause in which it appears, including the phrase, "in any manner not authorized," etc. To read "knowingly" as having nothing to do with the phrase "in any manner not authorized" is, we suppose, verbally tenable, but it is not the only meaning the words will bear, nor even, we think, the more natural one.

United States v. Marvin, 687 F.2d 1221, 1226 (8th Cir. 1982), cert. denied, 103 S. Ct. 1768 (1983). We believe that analysis to be appropriate here.

B.

However, our conclusion that "knowingly" applies to all elements of the offense in section 6298(d)(2)(A) does not impose on the government as difficult a burden as it fears. On this issue, we are guided by the Court's holding in United States v. International Minerals & Chemical Corp. 402 U.S. at 563, that under certain regulatory statutes requiring "knowing" conduct the government need prove only knowledge of the actions taken and not of the statute forbidding them. See also United States v. Udofot, 711 F. 2d 831, 836 (8th Cir.)(knowing delivery of firearms to carrier), cert. denied, 104 S. Ct. 245 (1983); United States v. Currier, 621 F.2d 7, 10 (1st Cir. 1980) (knowing failure to maintain firearms transaction records). As the Court stated

in International Minerals,

> The principle that ignorance of the law is no defense applies whether the law be a statute or a duly promulgated and published regulation. In the context of these proposed 1960 amendments we decline to attribute to Congress the inaccurate view that that Act requires proof of knowledge of the law, as well as the facts, and that it intended to endorse that interpretation by retaining the word "knowingly."

402 U.S. at 563.

The Court recognized that under certain statutes, such as the income tax law, the government must show a purpose by defendant to bring about the forbidden result. However, the Court in International Minerals, construing a statute and regulations which proscribed knowing failure to record shipment of chemicals, stated,

> [W]here, as here and as in Balint and Freed, dangerous or deleterious devices or products or obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or

> dealing with them must be presumed to be aware of the regulation.

558 U.S. at 565 (emphasis added).

Even the dissenting Justices, viewing the highly regulated shipping industry, agreed that the officers, agents, and employees

> are under a species of absolute liability for violation of the regulations despite the "knowingly" requirement. This, no doubt, is as Congress intended it to be. Cf. United States v. Dotterweich, 320 U.S. 277; United States v. Balint, 258 U.S. 250. Likewise, prosecution of regular shippers for violations of the regulations could hardly be impeded by the "knowingly" requirement for triers of fact would have no difficulty whatever in inferring knowledge on the part of those whose business it is to know, despite their protestations to the contrary.

402 U.S. at 569.

The indictment in this case specified the crime in the language of the statute. Thus it did not include language spelling out the knowledge requirements of

the statute discussed in text. Nevertheless, in light of our interpretation of section 6928(d)(2)(A), it is evident that the district court will be required to instruct the injury, inter alia, that in order to convict each defendant the jury must find that each knew that Johnson & Towers was required to have a permit, and knew that Johnson & Towers did not have a permit. Depending on the evidence, the district court may also instruct the jury that such knowledge may be inferred.

The indictment charged that both individual defendants "managed, supervised, and directed a substantial portion of Johnson & Towers' operations at the Mount Laurel plant, including those related to ...disposal of hazardous wastes and pollutants." App. at 7a. This case reaches us without any evidence or findings of the defendants' actual knowledge of the

facts at issue, and with inconsistent descriptions of defendants' responsibilities. As the Supreme Court said in Dotterweich, the question of responsibility can be left to "the good sense of prosecutors, the wise guidance of trial judges, and the ultimate judgment of juries." 320 U.S. at 285.

IV.

In summary, we conclude that the individual defendants are "persons" within section 6928(d)(2)(A), that all the elements of that offense must be shown to have been knowing, but that such knowledge, including that of the permit requirement, may be inferred by the jury as to those individuals who hold the requisite responsible positions with the corporate defendant. For the foregoing reasons, we will reverse the district court's order dismissing portions of counts 2, 3 and 4 of the indictment, and we will remand for further

proceedings consistent with this opinion.

A True Copy:

Teste:

Clerk of the United States
Court of Appeals for the
Third Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 835745

UNITED STATES OF AMERICA,
Appellant

v.

JOHNSON & TOWERS, INC.,
JACK W. HOPKINS and PETER ANGEL

On Appeal from the United States
District Court for the
District of New Jersey
(D.C. Criminal No. 83-00083)

Argued May 21, 1984

BEFORE: GARTH, SLOVITER, Circuit Judges,
and NEAHER, District Judge*

ORDER AMENDING OPINION

It is hereby ORDERED that the Opinion in the above case filed August 15, 1984, is amended as follows:

Page 15, after the second indented quote, delete "558 U.S. at 565 (emphasis added)." and substitute therefor "402 U.S. at 565 (emphasis added)."

---

* Hon. Edward R. Neaher, United States District Court for the Eastern District of New York, sitting by designation.

Page 16, first full paragraph of text, third sentence, delete "injury" and substitute therefor "jury".

BY THE COURT,

/s/ Dolores K. Sloviter
Circuit Judge

Dated: August 21, 1984

A True Copy:

Teste:

Clerk of the United States
Court of Appeals for the
Third Circuit

APPENDIX C

NOT FOR PUBLICATION

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA	:	Criminal No. 83-83
	:	
v.	:	ORIGINAL FILED
	:	SEP 6, 1983
JOHNSON & TOWERS, INC.	:	
JACK W. HOPKINS and	:	OPINION
PETER ANGEL,	:	
	:	
Defendants.	:	

APPEARANCES:

W. Hunt Dumont, United States Attorney
By: Michael V. Gilberti, Assistant U. S. Attorney
Samuel P. Moulthrop, Assistant U.S. Attorney
970 Broad Street
Newark, New Jersey 07102
Attorneys for United States of America

Jeffrey A. Libert, Esquire
Falciani & Fletcher
35 South Broad Street
P.O. Box 379
Woodbury, New Jersey 08096
Attorney for Defendant Jack W. Hopkins

Joseph A. Carmen, Esquire
43 Kings Highway West
Haddonfield, New Jersey 08033
Attorney for Defendant
Peter Angel

BROTMAN, District Judge

This is a criminal prosecution brought by the United States against defendants Jack Hopkins and Peter Angel.[1] On March 29, 1983, a federal grand jury returned a five count indictment charging defendants with a conspiracy to dispose of hazardous waste unlawfully, 18 U.S.C. §371; three substantive counts of unlawful dumping under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §6928(d)(2)(A); and one count of unlawfully discharging pollutants in violation of the criminal provisions of the Clean Water Act, 33 U.S.C. § 1319(c). The indictment also alleges that the defendants aided and abetted the company in its acts of unlawful dumping.

18 U.S.C. § 2. Defendants, in this motion, seeks to have the court dismiss the indictment.

A brief factual history is necessary. Johnson & Towers, Inc., the company that employs both Hopkins and Angel, is in the business of repairing and overhauling large motor vehicles. It operates a plant in Mount Laurel, New Jersey. Defendant Angel is the service manager in the trucking department and defendant Hopkins is the shop foreman. Both men have been employed by Johnson & Towers since at least 1976.

During its business operations, Johnson & Towers allegedly used substantial quantities of caustic and chemical degreasers to clean automotive components. The degreasers contain chemicals such as methylene chloride and trichloroethylene which are classified as "hazardous wastes"

under RCRA and "pollutants" under the Clean Water Act. After using the degreasers, the employees of the company would drain the vats and collect them in a tank. When the tank was full the waste would be pumped into a trench in the back of Johnson & Towers' plant. On occasion, the ehcmicals (sic) would flow into a nearby creek which, in turn, flows into the Delaware River. Both Angel and Hopkins allegedly directed such activity on three separate occasions; June 8, 1981; June 9, 1981; June 10, 1981. Only on the last day did the chemicals flow into the creek.

The above activity was carried out despite the fact that defendants did not possess the necessary permit to do so lawfully. As a result Johnson & Towers, Inc., Peter Angel and Jack Hopkins were indicted.

Legal Discussion

This is a case of first impression. The substantive counts of the indictment were instituted pursuant to 42 U.S.C. § 6928(d)(2) of RCRA and 33 U.S.C. §1319 (c)(1) of the Clean Water Act ("CWA"). Section 6928(d)(2) reads, in pertinent part, as follows:

> Any person who--
>
> (2) knowingly treats, stores or disposes of any hazardous waste identified or listed under this subchapter either--
>
> (A) without having obtained a permit under section 6925 of this title...

The government maintains that it needs only prove three elements in order to establish a prima facie case under § 6928(d)(2); those elements being i.) that the defendant was a "person" as defined in 42 U.S.C. § 6703(15); ii.) that he knowingly treated, stored or disposed of hazardous waste; and iii.) that

he did not have a permit.

The defendants disagree with the government's simplistic reading of the statute. They contend that they were never required to obtain a permit and therefore should not be held criminally liable for acting without a permit. Moreover, defendants contend that, in view of both the language and the purpose of the statute, they do not fall within the intended scope of the law and should not be prosecuted thereto.

When construing a statute imposing criminal sanctions, it is important to give the alleged wrongdoer the benefit of any doubt as to the intended reach of that statute. Perrin v. United States, 100 S.Ct. 311 (1979); Donnelley v. United States, 276 U.S. 505, 512 (1927). Therefore, courts have traditionally interpreted such laws in a narrow fashion. Busic v. United States, 100 S. Ct. 1747 (1979).

The instant case presents no exception to these general rules of statutory construction. The language and scope of the relevant sections of RCRA are ambiguous. Furthermore, there is a dearth of accompanying legislative history, thereby depriving the court of much Congressional guidance as to the intended breadth of the law. As a result it is necessary for this court to analyze the relevant statutory language, policies and legislative comments before deciding whether Congress intended to include these defendants under the scope of RCRA's criminal provisions.

a.) Statutory language

It is well-established that when interpreting a statute the court must first turn to the relevant language. Touche Ross v. Redington, 442 U.S. 560, 568 (1979); 73 Am. Jur. 2d § 22 at 281; 71 A.L.R.2d 715. The government focuses

on a broad reading of the definition of the term "persons." The statutory definition reads as follows:

> Persons--...an individual, trust, firm, joint stock company, corporation (including a government corporation), partnership, association, state municipality, commission, political subdivision of a State, or any interstate body.

42 U.S.C. § 6903(15). Since defendants are individuals, they are thereby "persons" who disposed of hazardous waste (allegedly with knowledge) and did so without a permit. Therefore, according to the government they both fall within the confines of the statute. This analysis is far too simplistic and literal and it fails to take into account the statutory scheme and the unique wording of the criminal provision itself.

When analyzing the language of a statute it is proper to look to sources from which the law was derived. United

States v. Katz, 271 U.S. 354 (1926). RCRA is just one statute, among many, in the environmental regulatory scheme. See United States v. Price, 523 F. Supp. 1055, 1070 (D. N.J. 1981); Note, Liability for Generators of Hazardous Waste: the Failure of Existing Enforcement Mechanisms, 69 Geo. L.J. 1047, 1051 (1981). Other statutes also provide criminal sanctions for certain violations, including 33 U.S.C. § 1319 of the Clean Water Act, which coincidentally forms the grounds for Count 5 of the indictment in the instant case, and 42 U.S.C. § 7412(c) of the Clean Air Act. Both § 1319(c)(1) and § 7412(c) also use the term "person" when describing those with potential criminal liability. The statutory definition of "person" is almost identical to that which is used in RCRA. Compare 33 U.S.C. § 1362(5) with 42 U.S.C. § 6903(15). (The term person is defined in both the

Clean Water Act and Clean Air Act as "an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.") There is qualifying language in both § 1319(c)(3) and § 7412 (c)(3), however, which states the following proposition:

> "For the purposes of this subsection, the "person" shall mean, in addition to the definition contained in section 1362(5) of this title, any responsible corporate officer."

(Section 7412 (c)(3) uses substantially the same language).

Although Congress appears to define "person" in a broad manner, an obvious incongruity is created by virtue of the additional language in subsection (c)(3). If "person" is interpreted in the same fashion advocated by the government in the instant case, the language specifying "a responsible corporate officer"

would be superfluous. See, e.g., Lawson v. Suganee S.S. Co., 336 U.S. 198, 201 (1949) ("Statutory definitions control the meaning of statutory words, of course, in the usual case. But this is an unusual case. If we read the definition into § 8 (f)(1) in a mechanical fashion, we create obvious incongruities in the language..."). The environmental statutes raise unusual issues. They are primarily regulatory statutes complete with appropriate civil sanctions. The criminal sanctions were added because Congress felt that certain violations were more serious and therefore required more severe penalties. H.R. Rep. No. 1491, supra at 31, reprinted in U.S. Code Cong. & Ad. News at 31. The definition of the term "person," however, is applicable to the entire statute. Because of the qualifying language inserted in the criminal provisions we conclude that

Congress intended to limit the definition of "person" as it is used in those subsections.

Applying the same rationale to RCRA, we find that Congress also used language which appears to limit the scope of § 6928(d)(2)(A). Instead of stating that those persons who acted without a permit may be liable, § 6928(d)(2) specifically refers to those "persons" who acted "without having obtained a permit under section 6925." 42 U.S.C. § 6928(d)(2).[2] The Congressional choice of words in this instance is extremely important. By referring to those persons who could have obtained a permit, but failed to do so, Congress appears to be focusing on the parties who are responsible for registering with the EPA under § 6925 of RCRA. (This emphasis is similar to that put on "responsible corporate officers" in the analogous section of the

Clean Water Act.) The statute does not, however, purport to hold liable all those persons who work for a company that may be operating without the requisite permit.

We turn also, for guidance, to the companion criminal provisions articulated in § 6928(d). For example, subsection (d)(2)(B) also provides criminal sanctions for those "persons who knowingly...dispose of hazardous waste...in knowing violation of any material condition or requirement of such permit;" 42 U.S.C. § 6928(d)(2)(B). Congress intentionally used the term "knowing" twice with respect to that subsection, thereby ensuring that the alleged perpetrator was protected to the extent that the government would have to prove beyond a reasonable doubt that he knew of the disposal of hazardous waste and also that he knew such disposal was violating the terms of the permit.

The language of subsection (d)(2)(A), however, is far more open-ended. It does not put a burden on the government to prove that the alleged wrongdoers knew they were acting without a permit or in violation of the law. Instead, the subsection was drafted in an effort to impose strict standards on those required, by statute, to obtain permits because Congress believed that those persons should be solely responsible to account for potential harmful activity. Severe penalties were necessary to act as a deterrent to persons who failed to register with EPA. H.R. Rep. No. 1491, 94th Cong. 2d Sess. at 31, reprinted in 1976 U.S. Code Cong. & Ad. News 6238, 6269. However, while subsection (d)(2)(A) does not require the government to prove knowledge of action without a permit, it does limit those individuals who can be prosecuted for such

violations. Congress did not seek to hold criminally liable any employee involved in any manner in the disposal of hazardous waste, regardless of whether that employee was aware of the company's failure to obtain a permit. But see 21 U.S.C. § 301 et seq.; United States v. Park, 421 U.S. 658 (1975); United States v. Dotterweich, 320 U.S. 277 (1943).[3] If the government's literal interpretation of the subsection is adopted, it would extend the reach of the statute far beyond Congress' original intent.

b.) Congressional purpose

After interpreting the language used in a statute the court must also take into account the general purpose of the law itself; Helvering v. Stuart, 317 U.S. 154 (1942) and the objective of the provision at issue. United States v. Seeger,

380 U.S. 163 (1965). The general purpose behind RCRA is to provide "a multifaceted approach towards solving the problems associated with the 3-4 billion tons of discarded materials generated each year and the problems resulting from the anticipated 8% annual increase in the volume of such waste." H.R. Rep. No. 1491, supra at 2, reprinted in 1976 U.S. Code Cong. & Ad. News at 6239.

In order to further the aforementioned Congressional policy, criminal sanctions must be directed towards those individuals or corporations which are able to take effective action and thereby ensure compliance with the law. Only those persons who are considered "owners and operators" of a facility need actually apply for an EPA permit. 42 U.S.C. § 6925(a).[4] Unless the defendants in the instant action are so classified (see discussion, infra), they

are not in a position to obtain permission to dispose of hazardous waste in a legal manner. Therefore, holding them criminally liable for acting without a permit will not further the Congressional purpose of encouraging registration. Nor will such a result serve as an effective deterrent in future cases because those faced with criminal prosecutions are not ones who can do anyting material to rectify the problem. Instead, as in this instance, the corporate officers who bear responsibility for obtaining the permit, and who can change corporate policy in the future, are not threatened with any personal exposure.

The Congressional policy of deterrence directed towards those whose actions can have a substantial effect on the illegal disposal of hazardous waste is further evidenced by the other criminal provisions of § 6928(d). For example,

§ 6928(d)(1) provides criminal sanctions for "any person who--knowingly transports any hazardous waste identified or listed under this subchapter or to a facility which does not have a permit under section 6925...." 42 U.S.C. § 6928(d)(1). The language of subsection (d)(1) is obviously broader that than (sic) of subsection (d)(2)(A). The reason can probably be explained as follows: in the former situation a low-level employee such as a truck driver, is required by law to first check and see if the facility to which he is delivering the waste has a permit allowing it to dump such waste. If not, the transporter is obligated to take the waste elsewhere. The policy reasons behind this wide-ranging provision are obvious--Congress considered the person transporting the waste to be in the best position to ensure that it was disposed of in a legiti-

mate fashion. The transporter usually has enough flexibility to leave if he determines that the facility is operating unlawfully. (This can easily be accomplished by just asking the appropriate person to produce the necessary permit.)

On the other side of the coin, however, are the defendants in the instant action. These employees generally have no choice-- they are not in a position to ask for a permit themselves (and due to the nature of their work may not even be aware of such a requirement) and they did not possess enough authority within the company to force Johnson & Towers into compliance. Thus, it is clear that the broad-based language used in § 6928(d)(1)(B) furthers the Congressional policy inherent in the statute, yet the same reasoning applied to subsection (d)(2)(a) would not serve the same purposes.

c.) Fairness and equitable considerations

As discussed earlier in this opinion, Congress had some definite goals in mind when it enacted penal provisions within the RCRA statutory scheme. It was also aware, however, of the potentially harsh consequences that might result from criminal sanctions. Therefore, the House Report specifically notes that "the use of criminal penalties are sufficiently narrow in that they only apply to...the actual disposal of hazardous wastes without a permit...." H.R. Rep. No. 1491, supra at 31, reprinted in U.S. Code Cong. & Ad. News at 6369. Concededly, the narrow application of the statute to which this report speaks is the fact that the criminal provisions only reach those "more serious offenses" under RCRA. The comment does, however, give this court the indication that Congress

was quite selective when allocating potential criminal responsibility and as such, intended to impose such liability only in those instances where it would clearly further the statutory puposes. The instant case does not provide that type of situation.

The fact that Congress did not intend to impose criminal liability on just any person disposing of waste without a permit, is further evidenced by the complex and technical registration requirements imposed upon companies and individuals forced to register with EPA. 40 C.F.R. 122.1 et seq., 123.1 et seq., 264.1 et seq., 265.1 et seq., 267.1; see also EPA form 8700-12 (Instructions for Filing Notification of Hazardous Waste Activity). Not only are the legal requirements difficult to understand, but the scientific aspects of the law are also beyond the comprehension of

most laymen. See Moulthrop, Criminal Liability Under Federal Environmental Statutes, 104 New Jersey Lawyer 36, 38 (August, 1983). Even the initial step of determining whether or not registration is necessary becomes a job best left to scientists or engineers. See, e.g., 40 C.F.R. Part 261 (identification of hazardous wastes regulated by the EPA). Obviously the defendants in the instant action are not qualified to identify or analyze the waste they were handling and thereby bring it to the attention of EPA themselves. Nor are they in a position to hire an expert to perform that job. Instead, the corporation and those in a decision-making capacity are best suited to perform those chores. This is why Congress required only "owners and operators" to file for permits and consequently, why Congress could not have intended to hold a mere

employee criminally liable for disposing of hazardous wastes without possessing a permit.

Owners and Operators

The next question we must address is whether these defendants can be considered an "operator or owner" of a "facility (used) for the treatment, storage, or disposal of hazardous waste." 42 U.S.C. § 6925(a). The government argues that both men have "managed, supervised, and directed a substantial portion of Johnson & Towers' operations at the Mount Laurel plant, including those related to .... disposal of hazardous wastes and pollutants." See Government Indictment re: Peter Angel dated March 29, 1983, Paragraph 8; Indictment re: John Hopkins, Paragraph 7. Therefore, they are considered "operators" under the statute and

were not only capable of filing, but were obligated by law to file for a permit prior to disposing of hazardous wastes. Defendants, on the other hand, maintain that they were merely mid-level employees, specifically a "mechanic" and "manager of a mechanic," and as such they do not fit within the statutory definition of "owner or operator." See Letter Memorandum, Jack Hopkins, dated June 15, 1983, at pg. 2.

There is no dispute as to the fact that defendants are not owners of the company in question. The controversy arises with respect to the term "operator." The definition of "operator" is explained in the regulations as "the person responsible for the overall operation of a facility." (Emphasis added). 40 C.F.R. § 260.10 (1982). Although the definition itself is somewhat ambiguous, the implication is

that an operator is someone with control over the entire company, such as the president or the plant manager. The use of the terminology "overall operation" is indicative of an attempt to focus on those individuals who exercise primary control even though they may not actually own the company. A narrow reading of the term "operator" is also reinforced in light of the use of the pronoun "the" when referring to those parties responsible for obtaining the permit. If the EPA had intended to include a large number of people as "operators" it would have used the more general terminology: "a" or "any" person responsible.

Even after viewing the facts in a manner most favorable to the government, it is difficult to see how these defendants can fairly be considered operators. Mr. Angel was the service manager and possibly

in charge of one department, but he was not responsible for the overall operation of the Mount Laurel facility. Mr. Hopkins was one step below him on the hierarchical ladder. Most of the information necessary for procurement of the permit, however, could only be provided by those with an intimate knowledge of the company. At least two men were in positions of greater authority than these defendants; Mr. Peter Johnson, the General Manager of the plant and Mr. Walter Johnson, Jr., the President and Chairman of the Board of Johnson & Towers. Not only were these men in positions of authority at the company, but they were also the ones listed on the form Johnson & Towers filled out notifying the EPA of hazardous waste activity at the Mount Laurel plant. (See defense exhibit 1). Nowhere in those forms were the names of Peter Angel or John Hopkins and

it is unclear as to whether these men were even notified of the hazardous waste problem at the plant. Therefore, they do not fall within the ambit of those persons obligated to obtain a permit for the disposal of hazardous waste.

The only persons who can be held criminally liable, without requiring proof that they knew the dumping was taking place without a permit are those considered "owners and operators" under the statute. Peter Angel and John Hopkins do not fit in that category. For the reasons discussed in this opinion, the individual defendants do not fall directly within the scope of 42 U.S.C. § 6928(d)(2)(A).

Aiding and Abetting

The government maintains that even if these defendants cannot be held criminally liable directly under RCRA, they

can still be held responsible as aiders and abettors pursuant to 18 U.S.C. § 2.[5] In order to hold someone liable for aiding and abetting, the government must prove that the person associated himself with a criminal enterprise, that he desired to participate in it as something he wished to bring about, and that he sought by his actions to help it succeed. United States v. Barber, 429 F.2d 1394, 1397 (3rd Cir. 1970); United States v. Thomas, 676 F.2d 531 (11th Cir. 1982). Moreover, one may be incapable of committing a particular crime, yet still be held culpable as an aider and abettor. United States v. Kelley, 395 F.2d 727 (2nd Cir. 1968). As such, the government must establish that the defendants were aware of the illegal activity. In other words, Angel and Hopkins can only be found guilty if they knew that Johnson & Towers was

disposing of hazardous waste without the necessary permit and they encouraged or participated in such action. Hernandez v. United States, 300 F.2d 114 (9th Cir. 1962); White v. United States, 366 F.2d 474 (10th Cir. 1966).

To the extent that the defendants can be found guilty of aiding and abetting pursuant to 18 U.S.C. § 2, the criminal activity to which Johnson & Towers has already pled guilty, counts two, three, and four of the indictment, must be kept intact. The language, however, in those counts, charging defendants Angel and Hopkins with violations of 42 U.S.C. § 6928(d)(2)(A), must be stricken from the indictment.[6]

/s/_____
STANLEY S. BROTMAN
J.S.D.J.

Dated: September 6, 1983

FOOTNOTES

1. The corporate entity, Johnson & Towers, Inc., was the third defendant in this action. Johnson & Towers has already pled guilty to three counts of the indictment.

2. Congress could have easily stated that any person knowingly disposing of hazardous waste "without a permit" may be held criminally liable. Such language would be less ambiguous.

3. The Supreme Court, in Dotterweich, held that Congress could impose criminal liability on corporate officials even if they were not aware of the wrongdoing. 320 U.S. at 281. That decision , however, was arrived at only after the Court considered the background and purposes behind the statute at issue in Dotterweich; the

Food and Drugs Act of 1906, 52 Stat. 1040, codified at 21 U.S.C. §§ 301-392. Rather than stressing the limitations of that law, the House Committee referred to inadequacies in prior food and drug laws and emphasized the need to "increase substantially the criminal penalties....which manufacturers have regarded as substantialy (sic) a license fee for the conduct of an illegitimate business." H.R. Rep. No. 3129, 75th Cong. 2d Sess. pt. 1 at 4. The Senate Committee also highlighted the need for more far-reaching provision that would "strengthen and extend that law's protection of the consumer." S. Rep. No. 152, 75th Cong., 1st Sess. at 1. Congress, in explaining the need for criminal sanctions under RCRA, does not use such wide-

ranging language and therefore the scope of §6928 (d)(2)(A) is far more limited.

4. Since § 6925 requires extensive information to be submitted along with the request for a permit, it is unlikely and in most instances nearly impossible, for anyone who lacks broad decision-making authority to apply for such a permit.

5. 18 U.S.C. § 2 reads as follows:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures hits commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

6. Defendants did not raise any arguments with respect to Counts one and five

of the Indictment, therefore this court offers no opinion thereto. Of course, the conspiracy count (Count one) can still be valid even though defendants cannot be charged with the substantive offense. See Periera v. United States, 347 U.S. 1, 11 (1954).

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA	:	Criminal No.83-83
	:	
v.	:	
	:	ORIGINAL FILED
JOHNSON & TOWERS, INC.	:	Sep 6 1983
JACK W. HOPKINS and	:	
PETER ANGEL,	:	O R D E R
	:	
Defendants.	:	

This matter having come before the court on the 27th day of July, 1983; and

The court having considered the briefs, exhibits and oral argument; and

For the reasons stated in the court's opinion filed this date,

It is on this 6th day of September, 1983, hereby ORDERED that the motion by defendants Peter Angel and Jack Hopkins for an order dismissing the indictment is GRANTED in part and DENIED in part in that:

a. the portion of the indictment

charging defendants with violations of 42 U.S.C. § 6928(d)(2), including those charges in counts 2, 3 and 4, are dismissed from the said indictment.

b. the remainder of the indictment, including those charges relating to 18 U.S.C. § 2, also in counts 2, 3, 4 and 5, are still in full force and effect.

No costs.

/s/_____
Stanley S. Brotman
U.S.D.J.

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA	:	
	:	Criminal No. 83-83
v.	:	
	:	Title 18, United States
JOHNSON & TOWERS, INC.,	:	Code, Sections 371 and 2; Title 42, United
JACK W. HOPKINS and PETER ANGEL;	:	States Code, Section 6928; and Title 33,
	:	United States Code,
Defendants.	:	Section 1319

ORIGINAL FILED
MAR 29, 1983

The Grand Jury for the District of New Jersey, sitting at Camden, charges that:

INTRODUCTION

1. At all times relvant (sic) here, the United States Environmental Protection Agency ("EPA"), an agency of the United States government, was authorized to make and enforce regulations controlling all aspects of hazardous

waste, (including the generation, transportation, treatment, storage and disposal) under the Resource Conservation and Recovery Act ("RCRA"), Title 42, United States Code, Section 6901 et seq. During this period, the EPA regional office (EPA-Region II), located at 26 Federal Plaza, New York, New York, had responsibility for events relating to and occurring in New Jersey.

2. Pursuant to RCRA, EPA made and published a series of regulations controlling the generation, transportation, treatment, storage and disposal of hazardous wastes. ("the RCRA regulations")

3. At all times relevant here, the Defendant JOHNSON & TOWERS, INC., ("JOHNSON & TOWERS"), has operated a plant facility at Route 38 and Briggs Road, Moorestown, New Jersey, (mailing address Route 38 and Briggs Road, Mount Laurel, New Jersey).

("the Mount Laurel plant") During this period, the defendant has maintained a holding tank next to the Mount Laurel plant building and a spillway leading from the holding tank to a trench ("the trench") which runs along the JOHNSON & TOWERS property line into Parker's Creek. Parker's Creek empties into Rancocas Creek, which is a tributary of the Delaware River. Parker's Creek is a part of the waters of the United States.

4. Since approximately 1976 when it opened, the Mount Laurel plant has been engaged in the business of repairing, rebuilding and overhauling motor vehicles, such as buses and trucks, and has used substantial quantities of degreasers and other industrial chemicals in its operations.

These degreasers and other industrial chemicals constitute "hazardous wastes" (as defined by RCRA, Title 42, United

States Code, Section 6903(3), (5) and (33), 6922, 6925 and 6926, and 40 Code of Federal Regulations, Section 261.33, App.VII) and "pollutants" (as defined by the Federal Water Pollution Control Act ("the Clean Water Act"), Title 33, United States Code, Section 1362(6)). The components of these hazardous wastes and pollutants, such as methylene chloride (dichloromethane), chlorobenzene, tetrachloroethylene, toluene, dicholorobenzene and ethyl benzene, are harmful to human life and health, and many are suspected carcinogens.

5. Since approximately 1976, JOHNSON & TOWERS and the Mount Laurel plant treated, stored and disposed of hazardous wastes, and was subject to RCRA and the RCRA regulations.

6. At all times relevant here, JOHNSON & TOWERS and the Mount Laurel plant

constituted a "point source" (as defined by the Clean Water Act, Title 33, United States Code, Section 1362(14)), and was subject to the Clean Water Act.

7. At all times relevant here, the defendant JACK W. HOPKINS, the foreman of the Mount Laurel plant, managed, supervised and directed a substantial portion of JOHNSON & TOWERS' operations there, including those related to the treatment, storage and disposal of the hazardous wastes and pollutants.

8. At all times relevant here, the defendant PETER ANGEL also managed, supervised and directed a substantial portion of JOHNSON & TOWERS' operations at the Mount Laurel plant, including those related to the treatment, storage and disposal of hazardous wastes and pollutants.

9. At all times relevant here, the defendants neither applied for nor poss-

essed:

(a) a permit required under RCRA (Title 42, United States Code, Sections 6925 and 6926, and Title 40, Code of Federal Regulations, Sections 122.1-122.30); and

(b) a permit required under a provision of the Clean Water Act called the National Pollutant Discharge Elimination System ["NPDES"] (Title 33, United States Code, Section 1342, and Title 40, Code of Federal Regulations, Section 122.1 et seq.).

COUNT 1

1. Paragraphs 1 through 9 of the Introduction to this Indictment are incorporated in this Count.

2. From at least as early 1976 until as late as June 10, 1981, at Mount Laurel and elsewhere in the District of New Jersey, the defendants

JOHNSON & TOWERS
JACK W. HOPKINS, and
PETER ANGEL

did knowingly and wilfully combine, conspire, confederate and agree with each other and with others, to commit offenses against the United States by knowingly treating, storing and disposing of, and causing to be treated, stored and disposed of hazardous wastes and pollutants, without permits, in violation of RCRA and the Clean Water Act.

3. It was a part of the conspiracy that:

(a) Since approximately 1976, the defendants and others at their direction and on their behalf would place quantities of degreasers and other industrial chemicals, used during JOHNSON & TOWERS' business operations, into the holding tank at the Mount Laurel plant.

(b) The defendants and others at their direction and on their behalf would, as many as three times per week, attach a pump to the holding tank for the purpose of pouring and dumping those degreasers and other industrial chemicals from the holding tank into the spillway and the trench at the Mount Laurel plant.

(c) The defendants and others at their direction and on their behalf, without a permit, would discharge the degreasers and other industrial chemicals into the trench and into Parker's Creek.

In violation of Title 18, United States Code, Section 371.

OVERT ACTS

In furtherance of the conspiracy and to effect its objects, the following overt acts were committed within the District of New Jersey and elsewhere:

1. On or about June 8, 1981 at the Mount Laurel plant, an employee of JOHNSON & TOWERS was caused by JACK W. HOPKINS and PETER ANGEL to attach a pump to the holding tank and to pump a substantial quantity of degreasers and other industrial chemicals into the trench.

2. On or about June 9, 1981 at the Mount Laurel plant, an employee of JOHNSON & TOWERS was caused by JACK W. HOPKINS and PETER ANGEL to attach a pump to the holding tank and again to pump a substantial quantity of degreasers and other industrial chemicals into the trench.

3. On or about June 10, 1981 at the Mount Laurel plant, an employee of JOHNSON

& TOWERS was caused by JACK W. HOPKINS and PETER ANGEL and of JOHNSON & TOWERS to attach a pump to the holding tank and again to pump a substantial quantity of degreasers and other industrial chemicals into the trench. On this date, those hazardous wastes and pollutants traveled the length of the trench and spilled into Parker's Creek.

All in violation of Title 18, United States Code, Section 371.

COUNT 2

1. Paragraphs 1 through 9 of the Introduction to this Indictment are incorporated in this Count.

2. On or about June 8, 1981, at Mount Laurel and elsewhere in the District of New Jersey, the defendants

JOHNSON & TOWERS
JACK W. HOPKINS, and
PETER ANGEL

did knowingly treat, store, and dispose of, and did cause to be treated, stored and disposed of hazardous wastes without having obtained a permit under the provisions of RCRA, Title 42, United States Code, Sections 6925 and 6926, in that the defendants discharged, deposited, injected, dumped, spilled, leaked and placed degreasers and other industrial chemical wastes into the trench at the Mount Laurel plant.

In violation of Title 42, United

States Code, Section 6928(d)(2), and

Title 18, United States Code, Section 2.

COUNT 3

1. Paragraphs 1 through 9 of the Introduction to this Indictment are incorporated in this Count.

2. On or about June 9, 1981, at Mount Laurel and elsewhere in the District of New Jersey, the defendants

JOHNSON & TOWERS,
JACK W. HOPKINS, and
PETER ANGEL

did knowlingly treat, store, and dispose of, and did cause to be treated, stored and disposed of hazardous wastes without having obtained a permit under the provisions of RCRA, Title 42, United States Code, Sections 6925 and 6926, in that the defendants discharged, deposited, injected, dumped, spilled, leaked and placed degreasers and other industrial chemical wastes into the trench at the Mount Laurel plant.

In violation of Title 42, United States Code, Section 6928(d)(2), and Title 18, United States Code, Section 2.

COUNT 4

1. Paragraphs 1 through 9 of the Introduction to this Indictment are incorporated in this Count.

2. On or about June 10, 1981, at Mount Laurel and elsewhere in the District of New Jersey, the defendants

JOHNSON & TOWERS,
JACK W. HOPKINS, and
PETER ANGEL

did knowingly treat, store, and dispose of, and did cause to be treated, stored and disposed of hazardous wastes without having obtained a permit under the provisions of RCRA, Title 42, United States Code, Sections 6925 and 6926, in that the defendants discharged, deposited, injected, dumped, spilled, leaked and placed degreasers and other industrial chemical wastes into the trench at the Mount Laurel plant.

In violation of Title 42, United States Code, Section 6928(d)(2), and Title 18, United States Code, Section 2.

COUNT 5

1. Paragraphs 1 through 9 of the Introduction to this Indictment are incorporated in this Count.

2. On or about June 10, 1981, at Mount Laurel and elsewhere in the District of New Jersey, the defendants

JOHNSON & TOWERS,
JACK W. HOPKINS, and
PETER ANGEL

did unlawfully, wilfully and negligently discharge and cause to be discharged from the Mount Laurel plant, a point source, into Parker's Creek, part of the waters of the United States, pollutants (as defined by the Clean Water Act, Title 33, United States Code, Section 1362(6)), including degreasers and other industrial chemical wastes.

In violation of Title 33, United States Code, Section 1319(c)(1), which

incorporates Title 33, United States Code, Section 1311, and Title 18, United States Code, Section 2.

A TRUE BILL

/s/ Patricia K. Davis
Foreman

W. HUNT DUMONT
United States Attorney

(2)

Office-Supreme Court, U.S.
FILED
JAN 8 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-586

In the Supreme Court of the United States

OCTOBER TERM, 1984

PETER ANGEL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

F. HENRY HABICHT II
Assistant Attorney General

DAVID C. SHILTON
DIRK D. SNEL
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether "any person" in Section 3008(d) of the Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6928(d), which makes disposal of hazardous waste without a permit a criminal offense, includes employees or is limited to owners and operators of plants that use hazardous wastes.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statute involved 1

Statement 2

Argument 7

Conclusion 10

TABLE OF AUTHORITIES

Cases:

United States v. *Apfelbaum*, 445 U.S. 115 8

United States v. *Bailey*, 444 U.S. 394 9

Statutes and regulations:

Clean Water Act § 309(c)(1), 33 U.S.C. 1319(c)(1) 4

Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, § 232, 98 Stat. 3257 ..... 2, 6

Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6901 *et seq.* :

§ 1004(15), 42 U.S.C. 6903(15) 8

§ 3001(b)(1), 42 U.S.C. 6921(b)(1) 3

§ 3005(a), 42 U.S.C. 6925(a) 4, 7

§ 3008, 42 U.S.C. 6928 ..... 1, 7, 8, 9

§ 3008(d), 42 U.S.C. 6928(d) 8

§ 3008(d)(2), 42 U.S.C. 6928(d)(2) 2, 3, 4, 5, 7, 8, 9

§ 3008(d)(2)(A), 42 U.S.C. 6928(d)(2)(A) 2, 5, 6

Page

Statutes and regulations—Continued:

§ 3008(e), 42 U.S.C. 6928(e) 8, 9
§ 3008(e)(1), 42 U.S.C. 6928(e)(1) 8

Pub. L. No. 96-482, § 13(5), 94 Stat. 2340 8

18 U.S.C. 2 4

18 U.S.C. 371 4

40 C.F.R. :

Pt. 261 App. VII 3

Section 260.10 5
Section 261.30 3
Section 261.31 3

Miscellaneous:

124 Cong. Rec. (1978):

pp. 21596-21597 8
pp. 34902-34905 8

130 Cong. Rec. S9161 (daily ed. July 25, 1984) 6

H.R. Conf. Rep. 96-1444, 96th Cong., 2d Sess. (1980) 8

H.R. Rep. 94-1491, 94th Cong., 2d Sess. (1976) 8

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-586

PETER ANGEL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-33a) is reported at 741 F.2d 662. The opinion of the district court (Pet. App. 36a-68a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 15, 1984. The petition for a writ of certiorari was filed on October 10, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Prior to amendment in 1984, Section 3008(d) of the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6928(d), provided in pertinent part:

Criminal penalties.

Any person who —

* * * * *

(2) knowingly treats, stores, or disposes of any hazardous waste identified or listed under this subtitle [42 U.S.C. 6921-6934] either —

(A) without having obtained a permit under section 3005 [42 U.S.C. 6925] (or 3006 [42 U.S.C. 6926] in the case of a State program) * * *; or

(B) in knowing violation of any material condition or requirement of such permit;

* * * * *

shall, upon conviction, be subject to a fine of not more than $25,000 ($50,000 in the case of a violation of paragraph (1) or (2)) for each day of violation, or to imprisonment not to exceed one year (two years in the case of a violation of paragraph (1) or (2)), or both. * * *

The statute was amended on November 9, 1984, by Section 232 of the Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, 98 Stat. 3257. As amended, Section 3008(d)(2)(A) now provides that any person who disposes of hazardous waste "without a permit under this subtitle" is subject to criminal penalties.

STATEMENT

Petitioner was charged with violating Section 3008(d)(2) of the Resource Conservation and Recovery Act, 42 U.S.C. 6928(d)(2), by causing hazardous wastes to be pumped from his employer's plant into a trench which fed into a creek and, ultimately, the Delaware River. Before trial, the district court struck these charges, noting that petitioner was "not responsible for the overall operation" of the plant (Pet.

App. 61a). The district court held that petitioner did not fit within the class of persons Section 3008(d)(2) was intended to penalize because he was not an owner or operator of the plant. The court of appeals reversed, concluding that petitioner was "any person" within the meaning of Section 3008(d)(2).

1. Petitioner is the service manager of the parts department at the Mount Laurel, New Jersey, plant of Johnson & Towers, Inc. (Pet. 11; Pet. App. 4a n.1). Bus and truck engines are repaired, rebuilt, and overhauled at the plant (Pet. 8; Pet. App. 3a, 38a), and degreasing agents "flow from the cleaning process utilized for purposes of cleaning and stripping engines" (Pet. 9). These liquids travel through a network of drains and pipes into a holding tank on plant property (Pet. 9; Pet. App. 3a). Plant personnel use large amounts of degreasers and other industrial chemicals containing methylene chloride, chlorobenzene, and ethyl benzene (Pet. App. 73a-74a), which have been listed as hazardous wastes by the Environmental Protection Agency (EPA) pursuant to Section 3001(b)(1) of RCRA, 42 U.S.C. 6921(b)(1).[1]

Petitioner was indicted on March 29, 1983, along with the foreman of the plant and their employer. The indictment alleged that petitioner "managed, supervised and directed a substantial portion" of plant operations, "including those related to the treatment, storage and disposal of hazardous wastes and pollutants" (Pet. App. 75a). It went on (Pet. App. 82a-87a) to accuse petitioner, the foreman, and their employer of having knowingly treated, stored, and disposed of hazardous wastes without obtaining the necessary permit, thereby violating Section 3008(d)(2) of RCRA, 42 U.S.C. 6928(d)(2). The indictment also charged Clean

---

[1]See 40 C.F.R. 261.30, 261.31, and 40 C.F.R. Pt. 261 App. VII.

Water Act violations and contained a conspiracy count.[2] The offense was alleged to have occurred on three consecutive days when degreasers and other industrial chemical wastes were pumped from the plant's holding tank into a trench on plant property (Pet. App. 73a, 78a, 82a-86a). On the third day, the overflow from the trench spilled into a creek which feeds a tributary of the Delaware River (Pet. App. 39a, 88a). Petitioner and the two co-defendants were also charged with aiding and abetting the RCRA violations, in violation of 18 U.S.C. 2 (Pet. 5-6; Pet. App. 83a, 85a, 87a). The corporate employer pleaded guilty to the RCRA violations (Pet. 6; Pet. App. 6a, 65a). Petitioner and the foreman pleaded not guilty and moved to dismiss the indictment.

2. The district court granted the motion in part. It refused to strike the aiding-and-abetting charges or the counts of the indictment involving the Clean Water Act (Pet. App. 69a-70a). But it struck those portions of the indictment which charged that petitioner and the foreman had violated Section 3008(d)(2) of RCRA, 42 U.S. 6928(d)(2). The court concluded that the seemingly broad phrase "any person," as used in Section 3008(d)(2), did not include employees. In the district court's view, "any person" who disposes of hazardous wastes "without having obtained a permit under section 3005" can only be a person required to apply for a permit (Pet. App. 47a). Those whom Section 3005(a) of RCRA, 42 U.S.C. 6925(a), requires to seek a permit are "operators or owners" of facilities used "for the

---

[2]The indictment (Pet. App. 88a-89a) charged petitioner and the co-defendants with discharging pollutants into waters of the United States in violation of Section 309(c)(1) of the Clean Water Act, 33 U.S.C. 1319(c)(1), and conspiring, in violation of 18 U.S.C. 371, to violate RCRA and the Clean Water Act (Pet. App. 77a-81a). No defendant has sought to dismiss the Clean Water Act count or the conspiracy count (Pet. App. 67a-68a).

treatment, storage, or disposal of hazardous waste." Petitioner and Hopkins were not owners of the plant. The district court found that they were not its "operators" either, because the relevant EPA regulation defines "operator" as "the person responsible for the overall operation of a facility," 40 C.F.R. 260.10. The district court noted that petitioner, although "the service manager and possibly in charge of one department, * * * was not responsible for the [plant's] overall operation" (Pet. App. 60a-61a). Neither was the foreman, who "was one step below [petitioner] * * * on the hierarchical ladder" (*ibid.*).

3. The court of appeals reversed and remanded, reinstating all of the RCRA charges. It concluded that "[i]t would undercut the purposes of the legislation to limit the class of potential defendants to owners and operators when others also bear responsibility for handling regulated materials" (Pet. App. 20a). The court of appeals interpreted the phrase "without having obtained a permit under section 3005" as merely identifying the RCRA permit section and as exempting permit holders from prosecution under Section 3008(d)(2)(A). This phrase, concluded the court, "has no other limiting effect" (*ibid.*). Accordingly, the court of appeals held that petitioner and his co-defendant each qualified as "any person" within Section 3008(d)(2).

The court of appeals also considered the meaning of "knowingly" in Section 3008(d)(2). It held that the statute required the prosecution to show that petitioner and the foreman knew that the substance they disposed of was a hazardous waste and that their employer was required to have, but did not have, a permit (Pet. App. 31a).[3] Such

---

[3]The government had contended (Pet. App. 21a) that the only proof needed for conviction was proof of the objective facts that the accused is a "person," that he handled hazardous wastes, and that no permit for such disposal or treatment was in existence. The government denied

knowledge, the court of appeals found, "may be inferred by the jury as to those individuals who hold the requisite responsible positions with the corporate defendant" (Pet. App. 32a). The court observed that the case had reached it without "any evidence or findings of the defendants' actual knowledge of the facts at issue, and with inconsistent descriptions of defendants' responsibilities" (Pet. App. 31a-32a). The case was remanded for trial.

4. Congress amended Section 3008(d)(2)(A), in light of the district court's opinion, to make clear that "any person" included employees. Pub. L. No. 98-616, 98 Stat. 3257. It did this by deleting the phrase "having obtained" from the subsection so that the provision forbids "any person" from disposing of hazardous waste "without a permit." On July 25 — before the court of appeals had reversed the district court — Senator Lautenberg, who introduced the amendment on the Senate floor, declared that the district court's decision in this case had created a "dangerous loophole" in RCRA. By confining criminal liability only to "owners and operators technically responsible for acquiring a disposal permit," the district court indulged in a "misreading of [previous] congressional intent," 130 Cong. Rec. S9161 (daily ed. July 25, 1984). Senator Lautenberg stated: "It was not the intent of Congress that criminal liability extend only to owners and operators of facilities who are responsible for obtaining a RCRA permit. * * * The amendment I offer * * * would clarify congressional intent to extend the criminal penalty provisions of RCRA to any person who knowingly engages in illegal dumping practices" (*ibid.*).

---

that defendants' knowledge that the waste was hazardous or that a permit was lacking need be proved. The government does not concur in the view that the prosecution must show actual knowledge of such matters, but has not sought further review of this aspect of the court of appeals' decision.

ARGUMENT

This case is not ripe for review since defendant has not been acquitted or convicted. Moreover, the decision of the court of appeals is, as petitioner states (Pet. 13), one of first impression. It correctly includes petitioner within the class of offenders, does not conflict with any decision of this Court or of any other court of appeals, and presents no issue warranting further review. Furthermore, since Section 3008 was amended in 1984, the issue presented by this case has been resolved for the future.

1. As an initial matter, whatever the merits of petitioner's contentions, they are not presently ripe for review by this Court. The court of appeals' decision places petitioner in the position he would have occupied had the district court denied the motion to strike. If petitioner is acquitted following a trial on the merits, his contentions concerning the meaning of Section 3008(d)(2) will be moot. On the other hand, if petitioner is convicted and his conviction is affirmed on appeal, petitioner will then be able to present his contention to this Court, together with any other claims he may have, in a petition for a writ of certiorari, seeking review of those final judgments. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.

2. Section 3008(d)(2) of RCRA, 42 U.S.C. 6928(d)(2), makes it unlawful for "any person" to dispose of hazardous waste without a permit. Petitioner would have himself read out of this class by equating "any person" with the much smaller class named in Section 3005(a) of RCRA, 42 U.S.C. 6925(a), "each person owning or operating" a hazardous waste facility. This smaller class describes those who must apply for the relevant EPA permit. Petitioner accuses the court of appeals of legislating into Section 3008(d)(2) the word employee (Pet. 15) — apparently suggesting that it would be odd to view an employee as a "person." But

"person" is defined in Section 1004(15) of RCRA, 42 U.S.C. 6903(15), to include "an individual," together with many other entities, and this definition governs usage of the term throughout RCRA.[4]

Nothing in the legislative history of RCRA shows "clear evidence of a * * * legislative intention" to depart from the plain meaning of the phrase "any person" or to restrict it in the manner proposed by petitioner and the district court (*United States* v. *Apfelbaum,* 445 U.S. 115, 121-122 (1980)).[5] When RCRA was enacted in 1976, the House committee report did not suggest that employees were exempt persons under the Act. To the contrary, it characterized the penalties of Section 3008(d) as providing "a broad variety of mechanisms so as to stop the illegal disposal of hazardous wastes" (H.R. Rep. 94-1491, 94th Cong., 2d Sess. 31 (1976)).[6]

---

[4]Besides "individual," a "person" under Section 1004(15) means a "trust, firm, joint stock company, corporation (including a government corporation), partnership, association, State, municipality, commission, political subdivision of a State, or any interstate body."

[5]The relevant legislative discussions of Section 3008, prior to the 1984 amendment, are found at H.R. Rep. 94-1491, 94th Cong., 2d Sess. 59 (1976); 124 Cong. Rec. 21596-21597, 34902-34905 (1978); H.R. Conf. Rep. 96-1444, 96th Cong., 2d Sess. 36-37, 40 (1980).

[6]The history of the 1980 Amendments to Section 3008 tends to refute the district court's idea that employees were excluded from the class of offenders. Section 13(5) of the 1980 Amendments (Pub. L. No. 96-482, 94 Stat. 2340) added Subsection (e) to Section 3008 (42 U.S.C. 6928(e)), which provided "enhanced felony penalties for certain life threatening conduct," H.R. Conf. Rep. 96-1444, *supra,* at 37-39. Amended Section 3008(e)(1) incorporates a violation of Section 3008(d)(2) as an element of its own prescribed offense. Significantly, the House committee commented that a "supervisor * * * who personally lacks the necessary knowledge" required in Subsection (e), should "not be criminally prosecuted for knowledge that only his subordinates possessed," H.R. Conf. Rep. 96-1444, *supra,* at 40. The negative inference is clear, namely, that, if the required *scienter* under Subsection (e) is established, then any

In short, the court of appeals correctly resolved the issue presented by petitioner by giving the phrase "any person" in Section 3008 its plain meaning.

3. Congress has amended Section 3008, and the legislative history of the 1984 Amendment clearly shows that any prior doubt whether Congress intended to include employees in the phrase "any person" has now been resolved. Since the issue is unlikely to arise in the future, this may be a case of first and last impression.

Moreover, denying the petition is not unfair to petitioner. The court of appeals stated that to convict under Section 3008(d)(2) a jury must find that petitioner knew or should have known that the waste being handled was hazardous (Pet. App. 23a), that his employer was required to have a permit, and that his employer had none (Pet. App. 31a). Thus, petitioner, after remand to the district court, will be in the unremarkable position in which most criminal defendants find themselves. "[T]he cases have generally held that, except in narrow classes of offenses, proof that the defendant acted knowingly is sufficient" (*United States* v. *Bailey*, 444 U.S. 394, 408 (1980)). No standard approaching strict liability, which the district court was prepared to apply to "owners or operators" of hazardous waste facilities (Pet. App. 49a), is presently part of the mandate from the court of appeals governing the way petitioner's innocence or guilt will be resolved.

In short, the issue presented does not warrant review by this Court because it will not arise again and no unfairness will result from denying the petition.

"subordinate" may be prosecuted under Subsection (e). And since Subsection (e) encompasses Subsection (d)(2) as a lesser included offense, it makes no sense to ascribe to Congress an intent to immunize low-level employees from Subsection (d)(2) prosecutions.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

F. HENRY HABICHT II
Assistant Attorney General

DAVID C. SHILTON
DIRK D. SNEL
Attorneys

JANUARY 1985

DOJ-1985-01